

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2485

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERNATIONAL CONTROLS CORP.,

Plaintiff-Appellee,

vs.

ROBERT L. VESCO,

Defendant.

CIVIL ACTION—ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
SAT BELOW: HON. CHARLES E. STEWART, JR., U.S.D.J.

BRIEF OF APPELLANT, VESCO & CO., INC.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court err in denying leave to intervene as of right when the Court had entered "preliminary findings" in other litigation that Vesco & Co., Inc. was the "alter ego" of the defendant Robert L. Vesco and issued a preliminary injunction restraining Vesco & Co., Inc., from disposing of its assets on the theory that such assets could be utilized to satisfy a possible judgment against Mr. Vesco?

STATEMENT OF THE CASE

This is an appeal by a prospective intervenor, Vesco & Co., Inc., [Vesco & Co.] from an Order entered under date of October 8, 1974, of the United States District Court for the Southern District of New York (Honorable Charles E. Stewart, Jr.) denying the motion by Vesco & Co. for leave to intervene as of right.

International Controls Corp. [ICC] commenced this action by complaint filed April 8, 1974, against the defendant Robert L. Vesco (3a). The complaint alleged breach by the defendant of his fiduciary duty to plaintiff, charging that Mr. Vesco had committed fraud and violated the federal securities laws and regulations. On April 9, 1974, upon an affidavit of Lois Seiler Yohonn, Esq., an attorney for the plaintiff, the Court entered an Order appointing David M. Butowsky, Esq., to serve process upon the defendant, Robert L. Vesco. Mr. Butowsky filed an affidavit with the Court on April 24, 1974, alleging that he had served a copy of the summons and complaint by registered mail upon Mr. Vesco. No answer to the complaint has been filed by Mr. Vesco, and on September 11, 1974, a default judgment was entered against him in the amount of \$2,900,000 with interest (12a).

On May 15, 1974, Vesco & Co. filed its Notice of Motion for leave to intervene. After a hearing before the Court on October 2, 1974, (15a), the District Court denied leave to

intervene by Order filed October 8, 1974. Notice of Appeal by Vesco & Co. to the United States Court of Appeals from the denial of its motion for leave to intervene was filed on November 1, 1974 (29a).

FACTS

This appeal is part of the complex litigation in both the state and federal courts which now surrounds the affairs of Robert L. Vesco.

A proper understanding of the position of Vesco & Co., Inc., cannot be gained without reference to the "preliminary findings" of the District Court which were affirmed by this Court in International Controls Corp. v. Robert L. Vesco, et al, 490 F. 2d 1334 (2d Cir. 1974), cert. den. sub. nom. Vesco & Co., Inc. v. International Controls Corp., ___ U. S. ___, 41 L. Ed. 2d 236 (1974). Perhaps the most concise explanation of the District Court's view of Vesco & Co.'s relationship to the allegations concerning Mr. Vesco are contained in Judge Kaufman's opinion for this Court in the review of Judge Stewart's findings and conclusions in the prior action:

"Vesco & Co., it appears, was incorporated in Delaware on July 12, 1972 as an estate planning device for Robert Vesco. At that time, Vesco exchanged 800,000 shares of ICC common stock for all of the preferred stock of Vesco & Co. The common stock of Vesco & Co. is owned by Patricia Vesco, Vesco's wife, as custodian for Vesco's children. The sole asset of Vesco & Co. is the block of ICC common stock which, through the additional contributions of Vesco's children, totals 846,380 shares. Further-

more, we have been advised that the officers of Vesco & Co. are Mrs. Vesco and defendant Shirley Bailey, Vesco's personal secretary." 490 F. 2d at 1349.

Judge Stewart found in that case that Vesco & Co. was Mr. Vesco's alter ego and, as such, would be equally liable should plaintiff sustain its claim of a §10(b) violation against Mr. Vesco. On plaintiff's motion, the District Court accordingly granted a preliminary injunction enjoining Vesco & Co. from disposing of the 846,380 shares of plaintiff's stock pendente lite. The District Court also granted ICC's motion for preliminary relief restraining Vesco & Co. from prosecuting a pending state court action, finding such injunctive relief necessary to protect and effectuate its judgment, entered with the consent of ICC, in SEC v. Vesco et al, [72 Civ. 5001].

In rejecting Vesco & Co.'s attack on the preliminary injunction issued by the District Court in that case, Judge Kaufman also stated that "although ICC does not claim that the ICC common stock itself represents the fruits of Vesco's fraudulent conduct, nevertheless we believe that the District Court had ample power as a court of equity to reach those assets under the jurisdictional purview of the 1934 Act". 490 F. 2d at 1351.

The complaint in the present action, unlike that in the prior action brought by plaintiff, does not name Vesco & Co. as a defendant. It alleges among other things that Mr. Vesco,

while a director, officer and stockholder of plaintiff, purchased a substantial block of the common stock of Empire Financial Corporation, and that he subsequently sold the stock in a public offering at a profit without permitting ICC to participate in the transaction or share in the profits. According to the complaint's allegations, Mr. Vesco's acts with respect to the Empire Financial stock constituted a breach of his fiduciary duty to plaintiff and fraud in violation of the Securities Exchange Act of 1934 and Rule 10b-5 of the Rules of the Securities and Exchange Commission.

For such acts, the plaintiff sought damages in the amount of \$2,900,000 from Mr. Vesco.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING
VESCO & CO'S MOTION FOR INTERVENTION
AS OF RIGHT WHEN THE COURT HAD
PREVIOUSLY ENTERED "PRELIMINARY
FINDINGS" THAT THE PROSPECTIVE
INTERVENOR WAS THE "ALTER EGO" OF
THE DEFENDANT ROBERT L. VESCO

The present position in which Vesco & Co. finds itself raises serious and disturbing questions concerning the basic fairness which it, like any litigant, has a right to expect under procedural and substantive law.

Although Vesco & Co. has consistently and forcefully maintained throughout the various actions surrounding the affairs of Robert L. Vesco that it is an independent entity which cannot be subjected to liability for his alleged acts, the present reality is that at least on the basis of a "preliminary" finding this argument has been rejected by the courts of this Circuit. Based on the bare facts of the identities of certain of its stockholders and the nature of its assets, it has been determined that Vesco & Co. may be subject to a preliminary injunction enjoining the disposal of the substantial part of its assets on the view that it is Robert Vesco's "alter ego" and, as such, would be equally liable should the plaintiff sustain judgments against Mr. Vesco.

The present status and extent of the claims now being

asserted against Mr. Vesco pose real and grave dangers to the assets held by Vesco & Co. The ruling of the trial court, we respectfully submit, simply ignores the significant interest which Vesco & Co. has in the subject matter of this action in preserving its assets from a judgment which, although purportedly against Mr. Vesco, may magically be transformed into a judgment against Vesco & Co. In the present situation, Vesco & Co. must have full rights to participate in all aspects of this matter to protect the vital interests it has in the protection of its property.

A. The ruling of the court below is contrary to the flexible and practical philosophy underlying intervention pursuant to Rule 24 of the Federal Rules of Civil Procedure.

The approach to intervention under Rule 24 is best demonstrated by the leading Supreme Court decision of Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 17 L. Ed. 2d 814 (1967). There the Court took a broad view of the circumstances under which intervention should be granted as of right under Rule 24(a), and expressly repudiated narrow constructions of the Rule's provision that intervention should be granted when the prospective intervenor "claims an interest relating to the property or transaction which is the subject of the action. . . ." Thus, as Justice Douglas wrote for the Court:

"Under old Rule 24(a)(3) those 'adversely affected' by a disposition of property will

usually be those who have an interest in the property. But we cannot read it to mean exclusively that group. Rule 24(a)(3) was not merely a restatement of existing Federal practice at law and in equity. If it had been, there would be force in the argument that the rigidity of the older cases remains unaltered, restricting intervention as of right very narrowly, as for example where there is a fund in court to which a third party asserts a right that would be lost absent intervention. Credits Commutation Co. v. United States, 177 U.S. 311, 316, 44 L. Ed. 782, 785, 20 S. Ct. 636; Central Trust Co. v. Chicago, R.I. and P.R. Co., 218 F. 336, 339. But the Advisory Committee stated that Rule 24 'amplifies and restates the present Federal practice at law and in equity.' We therefore know that some elasticity was injected, and the question is, how much. As stated by the Court of Appeals for the Second Circuit in the Central Trust Co. case, 'it is not always easy to draw the line.' Ibid." 17 L.Ed. 2d at 818.

Lower Federal courts have also stressed the flexibility of Rule 24. Thus, Judge Leventhal stated in Nuesse v. Camp, 385 F. 2d 694 (D.C. Cir. 1967):

"We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purposes of standing and intervention under Rule 24 (a). One court has recently reverted to the narrow formulation that 'interest' means a 'specific legal or equitable interest in the chose'. Toles v. United States, 371 F. 2d 784 (10th Cir. 1967). We think a more instructive approach is to let our construction be guided by the policies behind the 'interest' requirement. We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits

by involving as many apparently concerned persons as is compatible with efficiency and due process." 385 F.2d at 700 (Emphasis added).

B. The prior findings of the District Court have as a practical matter placed Vesco & Co. in a position similar to that of surety for Mr. Vesco's liabilities.

The position in which Vesco & Co., now finds itself is analogous to the principal-surety area, and specifically, to the rights of a surety to contest the principal's liability if the principal has defaulted. A surety stands in the shoes of the principal, and the surety generally has the right to raise any defense which the principal could assert. In Modern Brokerage Corp. v. Massachusetts Bond & Insurance Co., 54 F. Supp. 939 (S.D.N.Y. 1944), for example, plaintiff sued the defendant surety to recover on a performance bond for certain construction work. The surety raised the defense that the plaintiff had refused to enter arbitration proceedings, despite the principal's demand, and accordingly, that the action should be stayed until the principal's right to compel arbitration of disputes was given effect.

The Court upheld the surety's position, and its right to raise that defense, which was in actuality a defense belonging to the principal, for the "natural limit of the obligation of the surety is to be found in the obligation of the principal." (54 F. Supp. at 940). See also Asociacion De Az. De Gua. v. United States National Bank of Oregon, 423 F.2d 638 (9th Cir. 1970);

Centraal Stikstof Verkoop., N.V. v. Alabama State Docks Dept.,
415 F.2d 452 (5th Cir. 1969).

C. The findings of the District Court
create, as a practical matter, a present
interest of Vesco & Co. in the subject matter
of this action.

In the present action, Vesco & Co. faces a real and substantial danger to its assets if it is barred from intervention. The "preliminary findings: of the District Court place Vesco & Co. in a position where its assets are the likely target for satisfaction of the plaintiff's default judgment against Mr. Vesco. It is merely sophistry to ignore those findings, and the consistent position taken by the plaintiff in seeking to merge Mr. Vesco with Vesco & Co., in consideration of the present application for intervention. In view of the practical philosophy underlying Rule 24, the unique and pressing problems facing Vesco & Co. in the protection of its assets demand as a matter of due process that it be given its right to intervene in this litigation.

The failure of the plaintiff to designate Vesco & Co. as a defendant in this action is a mere stratagem which should be transparent to this Court. The relationship of Vesco & Co. to the allegations of this complaint is no different than that of the prior actions against Mr. Vesco; the plaintiff's failure to join Vesco & Co. is simply an attempt to avoid any contest on the merits of the complaint, and to confine future proceedings to the issue of whether Vesco & Co. is the alter ego of Mr. Vesco.

Plaintiff obviously hopes to gain some three million dollars without having the proof of the allegations of the complaint subject to active challenge and review. Under such circumstances, the "interest" which Vesco & Co. has in the subject matter of this action is substantial, and places it in a classic role requiring intervention--that of a party outside the litigation whose rights and interests in property are subject to possible adverse consequences by the litigation.

The fact that the property rights of Vesco & Co. are as yet not directly attached by the plaintiff should not preclude this Court from taking the practical approach which, we submit, mandates the grant of intervention. In Atlantis Development Corp, Ltd. v. United States, 379 F. 2d 818 (5th Cir. 1967), for example, the federal government sued to enjoin construction and dredging by defendants on coral reefs, claiming that defendants were trespassing on government property and acting without a required permit; defendants answered by denying the jurisdiction of the government to require a construction permit for the reefs and denying the jurisdiction of the court on the ground that the reefs were outside the territorial limits of the United States. In holding that the district court erred in denying intervention of right to a development company which claimed ownership of the reefs, the Fifth Circuit noted that the judgment between the government and the original defendants could not have any "direct, immediate effect" upon the property rights of the movant, Id. at 826; obviously, as in the present case, the movant could wait for

the judgment and raise its ownership claims in subsequent proceedings in the same lawsuit or in a separate action. Nevertheless, the court looked behind the technical status of the pleadings, and found that "in a very real and practical sense" the trial of the original suit could adversely affect the movant's attempts to assert its right to ownership. Id.

Plaintiff's careful framing of its allegations should not preclude this court from going behind the bare allegations to uncover the true nature of this action. We respectfully submit that the true nature of this action is that plaintiff is seeking to establish joint liability of Mr. Vesco and Vesco & Co. As such, appellant should be given its right to intervene as would any other party not initially joined facing potential joint liability. Both as a matter of substantive and procedural due process, Vesco & Co. is entitled to intervene in this action to contest not only the issue of damages, but the purported liability of defendant Robert L. Vesco as well.

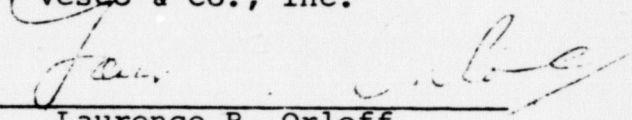
CONCLUSION

For the reasons set forth above, appellant Vesco & Co., Inc. respectfully requests that the Order of the District Court entered October 8, 1974, denying the motion to intervene be reversed, with instructions to grant intervention to appellant.

Respectfully submitted,

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By



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A Member of the Firm

~~Supreme Court of New Jersey~~
United States Court of Appeals
No. 74-2485

International Controls Corp.,

Plaintiff-Appellee,

VS.

Robert L. Vesco,

Defendant

STATE OF NEW JERSEY)
)
) :ss.
COUNTY OF MIDDLESEX)

PROOF OF SERVICE

I, JAMES B. RATTIGAN, of full age, being duly sworn according to law upon my oath, depose and say:

1. I am the Vice President of New Jersey Appellate Printing Co., Inc., a New Jersey corporation, the principal place of business of which is located at 399 Pearl Street, Woodbridge, New Jersey

2. On the 18th day of Dec. 1974, I ^{hand delivered} ~~placed in the Post Office at Woodbridge, New~~
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 2 Copies each Brief and Appendix of Appellant, Vesco & Co., Inc.

first class mail, addressed:

Shea, Gould, Climenko & Kramer, Eggs.

330 Madison Avenue

New York, New York 10017

Sworn and subscribed to
before me this 18th day
of Dec. 1974.

Donald D. Anzures

RONALD D. ANZIVINO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Feb. 9, 1976

James B. Rattigan
JAMES B. RATTIGAN

